In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 158.

THE B. F. GOODRICH COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING.

WILLIAM H. BEMIS,
Attorney for Petitioner.

BAKER, HOSTETLER & PATTERSON,
Of Counsel.

February 21, 1944.

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To the Chief Justice and the Associate Justices of the Supreme Court:

Now comes the above-named petitioner, The B. F. Goodrich Company, and presents this its petition for rehearing of the above-entitled cause and, in support thereof, respectfully shows:

First: That as a result of the rulings and the statements made by the Court in the course of oral argument, petitioner was not accorded a reasonable opportunity to be heard upon the issue upon which this case was decided; and

Second: That the rights of the petitioner were prejudiced thereby, in that the Court erred in holding that the proviso in Section 9(a) of the Agricultural Adjustment Act was not applicable to processed cotton taxed under Section 16 of said Act.

GROUNDS URGED IN SUPPORT OF PETITION WITH SUPPORTING REASONS.
(Statement of Counsel.)

I.

In 1934 the law firm of which I am a member rendered an opinion to The Rubber Manufacturers Association that, by virtue of the proviso in Section 9(a) of the Agricultural Adjustment Act, cotton taxed under Section 16 thereof was exempt from further tax under the Manufacturers' Excise Tax law. Subsequently, the Treasury Department having ruled contrary to such opinion, the firm of which I am a member was employed to bring suit to test such ruling. Accordingly, on January 4, 1936 my firm filed a suit in the Northern District of Ohio on behalf of The Goodyear Tire & Rubber Company for recovery of Excise taxes assessed and collected against said company. I tried that case in the District Court, secured a judgment in favor of the taxpayer, and on December 8, 1943, argued the case on the Government's appeal to the Court of Appeals for the Sixth Circuit. Similar suits for other rubber tire manufacturers involving the same issues were then pending in the District Court in Cleveland and Detroit awaiting the decision of the Court of Appeals in the Goodyear case.

Subsequent to the Government's appeal in the Goodyear case, this Court, in the instant case, had granted certiorari to review a decision of the Court of Appeals for the Ninth Circuit, which Court, without passing upon the question involved in the Goodyear case, had denied relief upon the sole ground that there was a variance between plaintiff's claim filed with the Commissioner of Internal Revenue and plaintiff's cause of action presented in the District Court. This was the sole issue presented in the petition for certiorari and the sole question presented in petitioner's main brief herein.

On December 10, 1943 the Government filed its answer brief in this case. Such answer brief asserted that the deci-

sion below should be affirmed upon grounds not considered by the Court of Appeals for the Ninth Circuit although argued by the Government in that Court and decided adversely to the Government by the District Court. That is, the Government argued (1) that the effect of the decision of this Court in *Butler v. United States* was to render the proviso in Section 9(a) inoperative *ab initio*, and (2) that in any event said proviso did not apply to cotton taxed under Section 16. As subordinate grounds for affirmance the Government's brief argued (3) that the record did not show that the tax sought to be recovered had not been passed on and (4) that there was a variance. The first two issues mentioned above were the same issues which the Government had previously asked the Court of Appeals for the Sixth Circuit to decide in the Government's appeal in the Goodyear case.

On December 14, 1943, Mr. E. Barrett Prettyman, then counsel for petitioner herein, for the reasons stated in his petition to withdraw as counsel filed herein, withdrew from this case, and thereafter I was employed to brief and argue the questions presented in the Government's answer brief.[1] The reason for my selection was that the Government had raised in this Court questions which I had argued in the Goodyear case and therefore I might be relied upon to protect the interests of the industry, including The B. F. Goodrich Company, in the questions thus sought to be decided.

This case was argued on January 3rd and 4th of this year. In the opening argument this Court declined to hear argument upon the merits, limiting argument to the sole question upon which certiorari had been granted. As a result of the express request of the Chief Justice during the opening argument, no time was devoted to the question

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[1] Mr. Prettyman had been General Counsel for the Bureau of Internal Revenue in 1934 when the ruling referred to above was made.

upon which this Court has now decided the case. Time was not reserved for that purpose on rebuttal.

Following the opening argument the Court's ruling limiting argument was withdrawn. This was done, however, after Government's counsel had concluded his argument upon the procedural question and after the Chief Justice had stated, responsive to the claim that argument upon the merits was a matter of right, that the Court was not interested in the questions on the merits, that if the Court agreed with the decision of the court below the litigation would be ended, otherwise the case could be remanded for consideration of the other questions by the court below, but that since it was the Government's time which was being used counsel could spend it as he saw fit. On rebuttal, with approximately twenty minutes remaining to me, I asked for additional time to argue the questions on the merits and was advised that while I was then at liberty to argue such questions no additional time would be allowed for that purpose. In view of the Court's statements to the Government's counsel and in view of the insufficiency of time, no part of the closing argument was devoted to the question upon which this Court has now decided the case.

As the members of this Court know, lawyers who appear here have difficult decisions to make in determining how they shall employ their time in argument. Frequently such decisions must be made without deliberation and in the stress of unforeseen complications which arise in the midst of trial. Every lawyer is acutely conscious of the fact that he makes such decisions at his peril and that he may not complain if it subsequently develops that he took the wrong course. In turn, lawyers who enter this Court are entitled to believe that they will not be misled by the Court itself. It was not easy to decide, when permission was given on rebuttal, not to argue the two primary issues on the merits which I was prepared to argue, had been employed to argue, and had argued successfully in two lower

courts. Nevertheless, rightly or wrongly, I believed from what had occurred in Court that this Court would not consider the questions on the merits and that in arguing such questions, contrary to the views expressed by the Court, I would put myself in the position of joining my adversary in asking for a decision upon issues which the petitioner had not sought to raise in this Court, which the Court did not desire to hear argued, and this without adequate time for fair presentation and hence to the prejudice of the interests which I represented.

I realize that the decision in this case was by a unanimous Court. I file this petition because I believe that I have not received the kind of treatment which lawyers expect from judges who themselves were trained as lawyers and who know from such training what it means to be in the trenches. That I blame myself for what has occurred, namely, that the rights of my clients in this case and in other pending cases have been decided without my having spoken a word upon the issue decided, does not alter my belief that under the circumstances which occurred here the most experienced counsel might have been similarly misled by the statements from the bench. It does not alter my belief that what this Court has done in this case was unfair, and that it is my duty to say so. The fact, which is taken as of course, that the Court did not intend unfairly to restrict or influence counsel in the presentation of the case, is the strongest possible reason why this petition should be granted and the petitioner given an opportunity to have its day in court.

II.

That under the circumstances above discussed the petitioner was prejudiced by the decision of this Court, may be briefly pointed out.

1. To construe the Agricultural Adjustment Act, Sections 9(a) and 16, as creating two classes of cotton

subject to distinct and different tax obligations, renders the law discriminatory and absurd. It creates different values for identical supplies of the taxed commodity, depending upon the unrelated circumstance of the date when the co..on was processed, and this contrary to the purpose of the Act, and particularly Section 16 thereof.

2. The construction adopted by the Court not only creates different values for identical supplies of the taxed commodity, it creates different values for identical supplies taxed under the same Section, namely, Section 16. The Act makes no provision for the identification of cotton processed prior to the effective date of the law. Without some identification there was no way of distinguishing supplies previously taxed under Section 16 of the Act. Hence if Congress intended, as this Court has now held, that floor stocks (taxed under Section 16) should be taxable under the Manufacturers' Excise Tax law and that other indistinguishable supplies of processed cotton (taxed under Section 9(a)) should not be, it is necessary to impute to Congress the intent that *floor stocks* held by *tire manufacturers* on a particular day should be taxed a second time and that *floor stocks* held by *other taxpayers* on that day, even though later used in the manufacture of tires and sold for that purpose, should not be. The law as construed simply could not be otherwise enforced, and was never sought to be enforced except as to floor stocks held by tire manufacturers on August 1, 1933.

3. The plain consequences of this Court's construction of the law as asserted above have never been challenged by the Government nor has the Government, by brief or otherwise, ever claimed that such consequences were contemplated or intended by Congress. That Congress did not intend the law to be so

construed may not successfully be disputed on oral argument before this Court.

4. The conclusion of the Court that the literal language of the Act does not warrant the construction claimed by the petitioner ignores the fact that Congress did not designate the tax under Section 16 as a floor stocks tax but as an adjustment of the processing tax. The processing tax being subject to a proviso, it does not follow, even as a matter of literal construction, that the qualifying proviso was not intended also to apply to the tax imposed as an adjustment of such qualified processing tax.

5. The right to a refund of the amount of processing taxes upon supplies held at the expiration of the Agricultural Adjustment Act, provided for in Section 16 (a) (2) thereof, is a right running in favor of all taxpayers. It is not limited to stocks held by tire manufacturers. Furthermore, by its express terms Section 16 (a) (2) applies, under the Court's construction of the language of the Act, solely to cotton taxed under Section 9(a). Hence Section 16 (a) (2) could not have been intended, as this Court has held, as an adjustment to relieve against double taxation of *floor stocks* to which the tire manufacturer is otherwise subjected.[1]

6. Prior to August 1, 1933, processed cotton contained in automobile tires was subject to a tax of two and one-fourth cents per pound under the Manufac-

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[1] The Court holds that the term "processing tax" refers only to the tax under 9(a). Section 16 (a) (2) uses the language, "there shall be refunded * * * a sum * * * in an amount equivalent to the processing tax * * *." Consistently with the Court's ruling, this could not authorize a refund of any tax paid under Section 16 since this would be to hold that the tax on floor stocks was a "processing tax."

turers' Excise Tax law. From August 1, 1933 to January, 1936 the cotton content of automobile tires was subject to a tax of 4.4184 cents per pound under the Agricultural Adjustment Act. At the expiration of this latter tax, under the decision in the *Butler* case, the cotton content of automobile tires again became subject to the tax of two and one-fourth cents per pound under the Manufacturers' Excise Tax law. At all times the cotton content of automobile tires was subject to at least one tax.

The purport and effect of this Court's decision in the instant case is that cotton held by automobile tire manufacturers on August 1, 1933 was subject to two taxes, a tax under Section 16 of the Agricultural Adjustment Act and a further tax under the Manufacturers' Excise Tax law. There is nothing in Section 16 of the Agricultural Adjustment Act which relieves the taxpayer from such double taxation. Thus under the provisions of the law, as construed by this Court, all tires were at all times subject to one or the other tax and the particular tires containing cotton taxed under Section 16 of the Agricultural Adjustment Act were at all times subject to both taxes. Plainly this was not the intention of Congress.

CONCLUSION.

It is submitted that the questions upon which this Court has rendered its decision herein are questions of substance and importance. No decision was rendered upon the issue for which certiorari was granted. That issue was passed over to decide the questions summarized in the discussion above. These questions were decided without permission to petitioner for opening argument, vouchsafed by the rules of this Court, and with the intimation that permission to argue them accorded to respondent was accorded upon technical considerations. That questions of

substance should thus be decided, at the end of eight years of litigation, on collateral consideration to the review of an unrelated procedural issue, without argument and contrary to the decision of two District Courts and the Court of Appeals for the Sixth Circuit, is obviously highly prejudicial. For all of the foregoing reasons it is respectfully urged that this petition be granted.

Respectfully submitted,

WILLIAM H. BEMIS,
Attorney for Petitioner.

BAKER, HOSTETLER & PATTERSON,
Of Counsel.

February 21, 1944.

I, WILLIAM H. BEMIS, attorney for the above-named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

WILLIAM H. BEMIS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 158.—October Term, 1943.

The B. F. Goodrich Company, a Corporation, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 31, 1944.]

Mr. Justice Black delivered the opinion of the Court.

This is a suit for refund of a portion of the manufacturers' excise tax on tires paid by the Pacific Goodrich Rubber Company, petitioner's wholly owned subsidiary, pursuant to Section 602 of the Revenue Act of 1932.[1] The District Court's judgment was for the Government, 48 F. Supp. 453, and the Circuit Court of Appeals affirmed. 135 F. 2d 456. Certiorari was granted on a petition which alleged that the Circuit Court's affirmance rested on its erroneous decision of procedural questions. We were asked in the petition to pass upon these issues: (1) Whether there was a material variance between the claim which had been denied by the Commissioner and that sued upon in the District Court. See R. S. § 3226, as amended; *United States* v. *Andrews, Executrix*, 302 U. S. 517. (2) Whether, if there was such a variance, it had been, or could have been, waived by the Government in the proceedings in the District Court. See *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. Argument at the bar and in the briefs of both parties was not, however, limited to these narrow procedural problems but also dealt with the merits of the claim for refund. This argument has disclosed that, regardless of the procedural questions, the judgment in favor of the Government can be supported on the ground that under the controlling tax statutes petitioner's claim has no merit. See *Helvering* v. *Gowran*, 302 U. S. 238, 245. We pass at once to a consideration of that decisive issue.

[1] "Sec. 602. Tax on Tires and Inner Tubes.

"There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

"(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight . . ." Revenue Act of 1932, c. 209, 47 Stat. 169, 261.

Petitioner claims it is entitled to the tax refund under provisions of the Agricultural Adjustment Act.[2] Section 9(a) of that Act authorized the imposition of a "processing tax" on the "first domestic processing" of basic agricultural commodities, including cotton. A proviso at the end of the section granted to manufacturers of certain products, including tires, a deduction from the excise tax on those products because of the payment of the "processing tax" on the cotton used in them.[3] Another section of the Act, § 16, imposed a different tax, equal to the processing tax, on articles held in floor stocks on a certain date for sale or other disposition which articles had been "processed wholly or in chief value" from a basic agricultural commodity.[4] This latter section did not grant any deduction from the manufacturers' excise tax because of the floor stocks tax. Nevertheless when the Pacific Goodrich Rubber Company computed its manufacturers' excise tax on tires it claimed deduction on account of the tax which it had paid on floor stocks of cotton fabrics. The Commissioner disallowed the deduction on the ground that, while deductions were allowable for cotton on which a "processing tax" had been paid under § 9(a), they were not allowable for cotton on which a tax on floor stocks had been paid under § 16. This suit is based on the premise that the deduction proviso of § 9(a) should be read into § 16.

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[2] 48 Stat. 31.

[3] "*Provided*, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid." 48 Stat. 36. Although the coverage of this proviso was not specifically limited to the excise tax on tires, the proviso came into § 9(a) as a Senate floor amendment introduced "to avoid an unduly burdensome tax on automobile tires." 77 Cong. Rec. 1959. The view was expressed on the floor of the Senate that, except for the proposed amendment, the cotton used in tires would be twice taxed by weight; once by the processing tax on cotton and again by the excise tax on tires. 77 Cong. Rec. 1960. See Note 1, *supra*.

[4] Section 16, entitled "Floor Stocks", read in part as follows: "Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect . . . with respect to the commodity, is held for sale or other disposition . . . by any person, there shall be made a tax adjustment as follows:

"(1) Whenever the processing tax first takes effect, there shall be levied . . . a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date." 48 Stat. 4[illegible].

Within the literal meaning of the Agricultural Adjustment Act a tax on floor stocks was not a "processing tax", and therefore the proviso in § 9(a) which spoke only of a "processing tax" on cotton was not literally applicable to the tax on floor stocks imposed under § 16. The tax on floor stocks, though complementing the processing tax, was not a tax upon the "processing" of an agricultural commodity but upon articles already processed from such a commodity and held for sale or other disposition on the date when the processing tax on the commodity went into effect. Although the literal language of the Act does not authorize the deduction which it claims, petitioner contends that the purpose of Congress to relieve tire manufacturers from so-called "double taxation" on cotton contained in tires will be defeated[5] unless we read into § 16 the proviso of § 9(a).

With this contention we cannot agree. In the form in which the Agricultural Adjustment Act was introduced in Congress, neither § 9(a), which authorized the "processing tax", nor § 16, which authorized the floor stocks tax, contained a proviso granting a deduction from the manufacturers' excise tax.[6] But § 16 of the bill did provide that under specified circumstances taxpayers subject to the floor stock tax would be entitled to a tax adjustment in the nature of a refund.[7] When the bill was under consideration in the Senate, § 9(a) was amended by adding a proviso[8] which authorized an adjustment on account of the "processing tax" in the nature of a deduction from the manufacturers' excise tax. Thus the bill as finally enacted provided one type of adjustment for the floor stocks tax in § 16 and a different type of adjustment for the processing tax in § 9(a). We have been pointed to nothing in the Act as a whole or its legislative

[5] See Note 3, *supra*.

[6] Senate Hearings on H. R. 3835, 73d Cong., 1st Sess., pp. 1, 3, 6.

[7] Section 16(a)(2) of the original bill, subsequently enacted without amendment, provided that, "Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum . . . in an amount equivalent to the processing tax with respect to the commodity from which processed." In reporting on § 16 the House Committee on Agriculture stated that, "A corresponding refund is provided on floor stocks when the processing tax finally terminates." H. R. Rep. No. 6, 73d Cong., 1st Sess., 6.

[8] The proviso originally introduced as an amendment to § 9(a) authorized an adjustment to be computed by deducting from the manufacturers' excise taxes on certain articles, including tires, "an amount equal to the processing tax paid on the cotton contained therein." 77 Cong. Rec. 1959. Subsequently the method of computing the permissible deduction was altered. See Conference Report accompanying H. R. 3835, printed as H. R. Report No. 100, 73d Cong., 1st Sess., 3; see also Note 3, *supra*.

history which shows that Congress considered these separate methods of adjusting the two taxes insufficient to prevent the burden of "double taxation" on the tire manufacturers so far as Congress wanted to prevent it. We cannot say, therefore, that the expressed intention of Congress is defeated by a literal interpretation of the Act which declines to read the proviso of § 9(a) into § 16.[9] The judgment of the Circuit Court is accordingly

Affirmed.

[9] Cf. Moore, Collector of Internal Revenue v. The Goodyear Tire & Rubber Company, decided by the Circuit Court of Appeals for the Sixth Circuit on January 24, 1944.